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No. 2507

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WOO WAI, WONG CHUNG and WONG YEE,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Oral Argument and Reply Brief of Plaintiffs in Error.

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ORAL ARGUMENT AND REPLY BRIEF OF PLAINTIFFS IN ERROR.

ORAL ARGUMENT OF J. C. CAMPBELL, COUNSEL FOR DEFENDANT.

While we have read a great many cases wherein officials of sovereign powers have gone out of their way for the purpose of attempting, as they may claim, to discover crime that is being committed, this case goes further than any reported in the books, because it displays a most remarkable state of affairs, reaching up to the presidential family, the Secretary of Com-

merce and Labor. The official activity involved here was not purposed to discover whether a citizen or an alien within the boundaries of the United States was engaged in the commission of a crime or a series of crimes, not to procure evidence to convict that person. The story of this case is remarkable. It may be that the officers of the United States thought it was a comedy; it turned out to be, according to this record, a great tragedy. And it runs thus: Two college professors, Professor Jenks of Cornell University, and Professor Sanford of Stanford University, were appointed by the Secretary of Commerce and Labor to investigate the officers of the Immigration Department on the Pacific Coast. For some reason undisclosed by the record and undisclosed at the trial in the court below, they became imbued with the idea that Woo Wai, one of the plaintiffs in error here, a merchant in San Francisco of almost forty years—a man whom the record shows was of unimpeachable character—knew something about the actions of the immigration officials. They sat down and planned among themselves—wonderful as it may be that these men who have been selected to teach the youth of America should do this—these men sat down and planned that they would induce this Chinaman to commit the semblance of a crime, not for the purpose of determining whether or nay he was indulging in a course of crime, but for the purpose of making him come through and inform against the immigration officers.

With that in view, the record shows that they employed a detective by the name of Roy, who had formerly been a jeweler in San Francisco and had taken up the business of discovering crimes by various nefarious means. He and Professor Sanford, professor of Physics at the Stanford University, conceived a plan whereby Woo Wai, through the intervention of the editor of a Chinese newspaper, was procured to consent to a meeting with Roy. Roy was not present at the trial; the defendant with the means within his power could not procure him, but the record reads so plain that he who runs may read that the plan was to get Woo Wai to agree to a semblance of a violation of the law for the express purpose, as the inspectors said, to make him "come through" on these other persons. He met Woo Wai and told Woo Wai that he knew how they could make money. Woo Wai asked him how, and he said "You will find out later." After several trials he finally induced Woo Wai to accompany him to San Diego. The journey was made at the expense of the Government of the United States, which paid the railroad fare, for the Pullman accommodations, and the hotel bill. At the Lanier Hotel in San Diego he was met, under appointment by Professor Sanford, by one of the immigration inspectors. The name of the inspector was Conklin. From thence he was taken to the Customs House and was introduced to Weddle, the inspector in charge. The evidence shows that Roy, in the

presence of Woo Wai, made to these people a proposition which they knew was going to be made to them, that they should permit Chinamen to come across the Mexican border, and should receive $50 a head.

The Chinamen stated that they could not go to Mexico, and it was then suggested by one of the immigration officers that they go to Ensenada, that there were between 300 and 500 Chinamen that wanted to come across from Ensenada and that a Chinaman should go there and arrange an agency whereby Chinese could come across the border into the United States. They explained to him how it could be done; that the Chinamen who came under the escort of Mexicans whom the officers would secure should wear a handkerchief in a certain way. But that is not all. They later obtained written permission from Mr. Straus, the Secretary of Commerce and Labor, to allow the Chinaman Wong Yee to go across the border for the obvious purpose of establishing this agency and to return. He did go. He came back, much to the disgust and indignation of the immigration commissioners, according to the record—and I am speaking from the record—and said he was unable to obtain any Chinamen to come across the border because they all thought he was connected with the government of the United States. The defendants had returned to San Francisco, and after the matter had slept until sometime thereafter—over a year—it was stirred up again, if I am permitted to use the expression, by the

immigration officers under the dictation of the parties at Washington. A letter was written to Woo Wai, and that was not sufficient; Conklin came to San Francisco, went to the house of Woo Wai and there suggested that it was a hard trip for the Chinamen to come over land and that he, the inspector, knew a man by the name of Jock, or Jack, who had a boat, and who would bring them over and then they would be taken care of by the inspectors. There was no such person in existence, as he admits, as Jock or Jack; he came up here simply for the purpose of obtaining some written evidence from Woo Wai for the purpose of accomplishing the government's project. He did obtain a letter written to the fictitious person by the hands of Woo Wai and another Chinaman named Mar Jick.

Finally, after months of persuasion, of inquiries by the officials asking: "What's the matter you?" of description of the feasible routes by marking the towns upon a map, showing Orange and Santa Ana, it was arranged that Chinamen should be brought across the border. Woo Wai was almost within their grasp. Some Chinamen crossed under Mexican escort but when the immigration inspectors attempted to swoop down upon them the Chinamen had flown. So Conklin went to San Francisco to induce Woo Wai to bring more Chinamen across. The second time the inspectors were more circumspect and the contraband were

arrested. For this the defendants were indicted, tried and convicted.

By way of illustration I will read to you a letter written by Mr. Sanford to Mr. Conklin, which shows the character of this transaction better than my words can express it. It is dated December 2, 1908. It is on the letterhead of the Fairmont Hotel, San Francisco:

> "Dear Conklin:
>
> "I have seen our friend since his return, and I think we will make matters all right yet. If someone else comes down there, tell Weddle to let them through anyway. I suppose he has received the telegram from Sec. Straus concerning Hoo Wai. The secretary wired me that he would instruct him to let him pass. I will stand the responsibility of your letting another man through if necessary. Use him yourself for all he is worth." (Trans., p. 67.)

In connection with that letter the testimony of Weddle is as follows:

> "I received the telegram the 24th or 25th; I think the 24th. I did not know what parties were coming. Professor Sanford told me in a previous interview that he wished to get certain information regarding San Francisco, and any party that came down to see me and interview me, to apparently consent to any offer they made. I told him at that time I would not do anything to break the law, but would apparently consent. I never intended to break the law, nor to enter into any conspiracy with Woo Wai or anybody else to break the law. All I wanted was to find out what they wanted

to do, and I followed it subsequently for the purpose of trying to arrest them. That was not my intention from the start, as I thought Professor Sanford wanted to get certain information from Woo Wai and wanted to get a hold on Woo Wai to get that information.

"Q. And Professor Sanford wanted to get information in relation to Dr. Gardner and Mr. North of the Immigration Commission in San Francisco?

"A. He didn't tell me that.

"Q. The Immigration officers there?

"A. People connected with the immigration offices. He didn't say who. I believe he wanted a hold on Woo Wai to make Woo Wai tell him those things.

"Q. And that is the purpose for which you entered into all those things?

"A. That was the first part; yes. I received the telegram dated October 25th in due course; the day before Mr. Roy and Woo Wai came down there."

The telegram was as follows:

"Party will call Conklin's home tomorrow Monday evening please be within reach. Sanford."

Under Section 2 of the Act of April 29, 1902 (32 Stat. 176, U. S. Comp. Stat. Supp. 1905, page 296), the Secretary of Commerce and Labor has the authority to change or modify the rules concerning Chinese immigration. He can, as he does, for example, permit Chinese laborers to come into the country for the purpose of the Panama Pacific Exposition. So he consented that this opera bouffe should be staged; that

the officers should induce these Chinamen to believe that they would cooperate with them in bringing Chinese laborers into the United States. He gave specific authority to a visit by Woo Wai to Mexico and return —a privilege which Wong Yee, under the persuasion of the officials, used. It was never the intention of any of the representatives of the government that a crime should be committed; it was never their intention that any Chinese contrabands should find a permanent abode in the United States or that any should come into the country at all except for the express purpose of getting a hold on this man, as they say, so that they could "use him for all he was worth" and compel him then to give testimony against other people.

The charge here is conspiracy. To constitute this there must be a meeting of the minds of the parties accused in an unlawful purpose—a purpose which if consummated would be a violation of the law. The record here shows, as I have pointed out, that there was no intention on the part of the government that a Chinaman should come across the border except for a temporary purpose and this accomplished, the contraband should be returned. Such was the course actually pursued. In these circumstances, it follows that the essentials of a conspiracy to violate the law of the United States were not present, and under the evidence no conviction could properly be had. If, as the dis-

trict attorney asserts, the government officers did not conspire, then the defendants did not conspire.

This idea was given expression in the case of

Woodworth v. *The State,* 20 Tex. Crim. App., 375.

There the charge of conspiracy was based upon the cooperation of the defendant with another who, however, entered into the unlawful purpose without criminal intent and solely with the design of entrapping the defendant. The court held:

> "Such being the recognized meanings of the term 'agreement,' we are of the opinion that the transaction between Hunt and the defendant did not constitute such a union of their minds, such a concurrence of purpose, intention and determination, as the law contemplates in defining a conspiracy. Hunt at no time intended to commit, or to assist in the commission of, the burglary. His assent that it should be committed was feigned, not real. If it was in the mind of the defendant to commit the burglary, Hunt was not of the same mind, for he did not intend to commit it or aid in its commission, but on the contrary he intended to prevent its commission. There was in fact no agreement on his part to engage in the commission of the burglary. There was in fact no union or concert of his will with that of the defendant, and such union or concert of wills must exist to constitute conspiracy (2 *Bish. Cr. Law,* Sec. 190). A conspiracy cannot be committed by one person alone (Id., Sec. 187).
>
> "This being our view of the law, we hold that the evidence fails to prove a conspiracy, and the

conviction is therefore set aside, and the cause is remanded." (p. 382)

The next point which we make, if your Honors please, is that in admitting certain evidence the court below committed error and ruled contrary to the decision of this Court in the case of

Dwinnell v. *United States,* 186 Fed., 754.

The charge in the indictment was a conspiracy to bring Chinamen into the United States. It is our contention, assuming for the sake of argument that there was a conspiracy under the law, that as soon as the Chinamen reached the territory of the United States the purpose of the conspiracy was accomplished and the crime was at an end. The learned judge in the court below permitted, over the objection of defendants, a great mass of evidence to be introduced before the jury concerning the conduct of defendants Wong Chung and Wong Wing Sai (not a plaintiff in error), after the contrabands were within the United States. For instance, he permitted evidence that they purchased tickets for these Chinamen from San Bernardino to San Francisco. All these were subsequent to the completion of the alleged conspiracy and were therefore improper. I believe that comes directly within the authority of this court in the case of Dwinnell.

That was a prosecution for conspiracy to defraud the United States by suborning certain persons to com-

mit perjury in making entries under the Timber and Stone Act. Evidence was admitted of acts of the alleged perjurers committed subsequent to the time when they swore to and filed their statements and of a subsequent agreement with the defendant to file a relinquishment of their obligations. This Court held that since these matters occurred after the alleged conspiracy was consummated they were inadmissible in evidence, and reversed the judgment.

But, if your Honors please, we return to the main question in this case: In this day and generation, where we boast of our progress and of our humanity and laws, can officers of the government of the United States place their hand upon an indefensible citizen, one who is pursuing the even tenor of his way, and for their own nefarious purposes induce that man to consent to an apparent crime, none being intended, not for the purpose of ascertaining whether he is engaged in criminal traffic or not, but for the purpose of using him for all he is worth, in the language of the letter of Professor Sanford, to obtain from him information which he may have upon other collateral matters? Why, if your Honors please, if that doctrine shall be promulgated as law, if that is the law of the land, the rack, the knee crusher and the thumb screw sink into utter insignificance; while physically more barbarous, they are infinitely less subtle.

What was their intention? Here was a man who had never been within the clutches of the law, a man

whom they knew an indictment or even the faintest imputation of wrong-doing would be a greater source of suffering than if he were put upon the rack. They intended to make this man believe that he had committed a crime, to make this man believe that he was a criminal within the purview of the laws of the United States, and thereby force him under that stress of mind, to compel him under that leverage and that power, if he knew anything, to divulge it against someone else; and because they failed in that particular thing, they arrested him, indicted him and convicted him.

The learned judge below held, and so instructed the jury, that these things were no defense to the charge of conspiracy. His charge practically took the case away from the jury.

A reading of the record shows these things were all done under the supervision and at the direction of those high in authority in Washington. If those things, those devices, can be resorted to, then human liberty is not safe. Particularly, if your Honors please, does it appeal so strongly to that which we know about the Chinese character. One place here a Chinaman says: "When I said some danger, they said, 'No, we are the government!' " Now, that would appeal, as you all know, to a Chinaman. In his country, the controlling power is like that of the Centurion of old who stated: "And I say unto one man go, and he goeth; and unto another, come, and he cometh."

When the government officers said: "Go ahead, everything is all right," they believed that it was all right.

And now a special plea for the defendant Wong Yee. The extent of his yielding to the inducement of the government officials was to journey twice, upon their insistence and assurance that they as the government itself would protect him, to Ensenada, Mexico. Upon the latter of these journeys one of his eyes became affected from exposure and the old man eventually lost the sight of that eye. He knew then that he could no longer be of advantage in the business of the government agents. As he quaintly put it: "I have a bad eye and I will quit that thing; I no can attend to that business. After that I didn't have anything more to do with the matter" (p. 164). He lost the sight of an eye in the service of the government; they would now deprive him of his liberty. We cannot believe that this purpose may be accomplished through the medium of a court of justice.

If your Honors please, the learned judge below instructed the jury that these matters constituted no defense. If it is no defense, and if it is the law that officers high in authority for the purposes of state, if you please, for the purpose of ascertaining whether or nay those who have received the appointment of immigration officers are conducting their offices honestly and faithfully, if they can by their *ipse dixit* send out detectives, use the strong arm of the government of the United States to seize innocent people of an alien

race that bow in their country to the supremacy of the power of the law, take them six or seven hundred miles away, pay their expenses, pay their hotel bill, take them into the office of the government of the United States, and there induce them, *pro forma* at least, to agree to a violation of the laws of the United States without any intention on their part that the laws of the United States should be violated, and thereby make felons of them, then I say the law is marred, and we in these United States should not turn our heads away and shudder at the quick way in which in Africa they behead people suspected of crime, because in a different way we would debauch a man and cause him to become a criminal who would otherwise be a good, respectable and decent person.

We say that this is not right—that this is not law. The brief of the government cites many cases in support of its contention. The meaning and effect of these authorities should be considered by way of reply but rather than take the time now for that purpose we will, with your Honor's permission, print a reply brief together with this argument.

Reply Brief of Plaintiffs in Error.

The opening pages of the brief of the district attorney are devoted to an attack upon the accuracy of the narrative contained in our opening brief. The sole basis of this attack is in the nature of a *reductio ad absurdum;* it is urged that if the facts had been as outlined by us there would have been a different verdict or a different sentence in the case. But we confess no surprise in the verdict; none in the sentence, and none in the attitude of the judge as disclosed when he pronounced his judgment. These all might have been otherwise if the learned jurist who presided at the trial had entertained the feeling of indignation which we sincerely believe is ordinarily prompted by a reading of the manner in which these Chinamen were made criminals. But the trial judge was disposed otherwise, whether temperamentally or from constitutional convictions, no one can say. What influences of life and training operated to mold and color his judgment we shall never know; but we do know that his opinions were honestly and conscientiously entertained, and with all respect we positively affirm that we believe he was in error. So there is no room for astonishment in reading of the action of the trial judge in view of his charge to the jury that the fact "that the government agents procured the defendants to commit the crime is not a valid de-

fense." And in view of that instruction there is no room for surprise in the verdict.

The district attorney proceeds, however, to ascribe the asserted inaccuracy of "The Story" to an undue reliance upon the testimony of the Chinese defendants and announces his desire

> "to controvert such statement of facts, and to briefly state the facts as they would seem to be from an unbiased reading of the record, and as they undoubtedly appeared to the judge and jury before whom they were presented."

But the district attorney fails to appreciate that the outcome of this proceeding in error depends implicitly upon the propriety of the instruction to the jury concerning the law of entrapment wherein the court charged:

> *"In other words were you to find the facts to be fully as testified to by the defendants who took the stand, these facts would constitute no legal or valid defense in law to the charge embraced in this indictment."* (Trans., p. 178.)

If, therefore, the facts as narrated by the defendants did, in the opinion of this Court, constitute a defense, prejudicial error has been committed. And notwithstanding the district attorney's assertion, made utterly without support in the record, that the testimony of these Chinese discloses that they entertain loose notions of the obligation of an oath, that testimony is the sole basis upon which the decision in

this Court is to be determined. So without further comment we may leave the district attorney's narrative of the facts of the case as immaterial. We cannot, however, forego the opportunity to point out the humorous quality implicit in the district attorney's assurance of the impartiality of his statement of the facts. The numerous references to the transcript in support of his narrative are with three exceptions (concerning perfunctory matters) at pages 1 to 133. *The defendants' case begins at page 134.*

It is plain that the instruction of the court that the evidence of the defendants constituted no defense was substantially a direction to find them guilty; there was no alternative. Let us then consider this fundamental issue both upon reason and in the light of the cases cited by both sides in support of their respective contentions.

The activity of government officials who participate in the commission of a crime for the purpose of arresting and convicting the criminal has given rise to a clearly defined distinction in the authorities. Crime is in itself naturally clandestine, and it is therefore necessary in order to detect the criminal in the act of wrong-doing that decoys be laid or even that government officers pretend to participate in the transaction. While there is some authority to the effect that in such a case a conviction will not be permitted, it seems that the weight of judicial decision is to the contrary. Among the latter are the numerous cases

in the federal courts where, for example, crimes against the postal laws have been committed in response to decoy letters. On the other hand, where there is no criminal activity which calls forth the effort to detect by means of decoy and where the conduct of the official goes farther than a mere inquiry to determine whether the suspect is ready and willing to break the law—where in fine the representative of the government approaches a person innocent of crime or criminal intention and by persistent effort and tempting promises undermines the integrity of his victim and ultimately procures him to commit a crime, the conduct of the official is abhorrent to the sense of decency and justice, and the government which has conferred the authority so viciously abused by the agent should not be and is not permitted to disavow the agency and to obtain a conviction. This is the radical distinction. Where one private individual induces another to commit a crime, this affords no defense to the criminal. This same theory underlies many decisions involving the entrapment of a suspected criminal where the detective does not disclose his official capacity and the suspect does not act under the assurance that the participation of the government's representative will afford security. But in the case at bar the jury, as we have pointed out, was instructed that the testimony of the defendants, even if believed by them, would not be a defense. The situation presented is (pursuing the testimony) that of

Chinamen innocent of criminal intent, whose leader is, without knowledge of the purpose of the journey, invited by a detective to visit Los Angeles and San Diego. Arriving there he is introduced to men who represent the government of the United States in their particular sphere of activity. Any casual student of the political history of China is at once impressed with the custom that the government official is the government itself—a custom of such long standing that it has become a tradition and is of course profoundly reflected in the intelligence and conscience of the Chinese race. Therefore, when Woo Wai evinced a disposition to reject the tempting bait which the makers of criminals held out to him, it is not surprising to find that the Chinaman was reassured by the declaration of the officer: "Oh, well, if we make no arrest, who can make arrest?" (Trans., p. 143.) And so the heredity and training of Wong Yee rendered him equally susceptible to the same powerful impression when to overcome his hesitancy about the business Conklin announced: "Well, he said, I the government. I protect you. No fraid you" (Trans., p. 155). Thus by dint of the constant prodding of the detective Roy in San Francisco, of the inspector Conklin, by correspondence, personal solicitation, gifts and simulated good will and affection for the children of his victim, the integrity of Woo Wai and his friends was dethroned. God knows it is difficult enough for the human conscience unaffected by such influences as

these and by ignorance borne of foreign nativity accurately to distinguish between the confines of right and wrong. Are these Chinamen to be branded as felons because they were not strong enough to withstand the attractive though nefarious partnership which the entire Department of Immigration held out to them? Will that branch of the executive function of the government known as the Department of "Justice" be permitted to disavow the conduct of another branch known as the Department of Commerce and Labor and to secure the conviction of men who, theretofore innocent of wrong, were induced by the latter's initial suggestion and frank cooperation to offend against the law? Upon principle it is submitted that there can be but one answer to this query. Cases maintaining this contention and many going much further than is necessary in the cause at bar were cited in the opening brief. But in view of the government's assertion that there is a contrary line of authority which permits a conviction under the facts presented here, we shall now proceed to analyze the cases cited for the purpose of demonstrating that without exception they bear out the line of demarkation stated above between the inducement of a criminal act in order to detect one engaged in criminal activity and the making of a criminal out of an innocent man.

The first case cited by the government in this connection is

De Graff v. *State*, 103 Pac. (Okla.), 538.

There the defendant was suspected of violation of the liquor law and when the detective in the guise of a casual customer applied for the liquor it was ready for sale. He described the incident as follows:

> "I went into the back room, and there I saw Mr. De Graff, the defendant. He asked me what he could do for me, and I told him I wanted a small bottle of beer. He opened an ice box and took out a black pint bottle of beer. It was labeled 'Adam's Special.' He pulled out the cork, and I drank the contents of the bottle." (p. 549)

Almost immediately following the extract quoted in the government's brief the Oklahoma court states the reasons underlying its decision:

> "Everybody knows that more devices and subterfuges are resorted to in attempting to violate prohibitory liquor laws, and to evade punishment therefor, than in all other departments of criminal law combined. Hence the necessity for the greatest vigilance and energy on the part of the officers in securing their enforcement." (p. 550)

It is plain from the foregoing that De Graff was not made a criminal. He was suspected of being a violator of the law and upon a test the suspicion was found to be justified.

The next authority cited is from the same jurisdiction,

Moss v. *State,* 111 Pac., 950.

The excerpt from the opinion quoted in the government's brief itself discloses that it is a case of the same character. For example, the court there points out that the offense

> "is one of a kind habitually committed and the solicitation merely furnished evidence of a course of conduct (citing cases). In many instances habitual and flagrant violations of the liquor laws can be detected by no other means. The officer or his agent may furnish the defendant in such cases the opportunity to sell, *but he does not furnish the defendant the liquor or the intent to sell;* and the sale to an officer is not more meritorious or less criminal than if made to some other person. We find nothing in the law or in public policy forbidding the detection of both the offense and the offender in this manner, and we have no criticism to expend upon a public officer who may find it necessary or expedient to adopt this means of discovering infractions of this law."

Next is

State v. *Smith,* 152 N. C., 798; 67 S. E., 508; and
State v. *Hopkins,* 154 N. C., 622; 70 S. E., 394.

In the former the court relied upon the Illinois case of *City of Evansville* v. *Myers,* where it was held:

> "A driver of a beer wagon who sells beer in

violation of a city ordinance is liable to punishment, though the city furnished the money and employed the purchaser as a detective to discover violations of the ordinance, where no fraud or deceit was used in the purchase or any inducement offered than a willingness to buy."

The excerpt from the *Hopkins* case is in itself sufficient to show that the same principle was there involved.

> "The methods adopted by the policeman to catch the defendant in the act of violating the law have been criticised; *but it must be remembered that the ways of 'blockaders' are devious and their trade is generally plied 'underground.'*"

The same is true of the quotation from

State v. *Lucas,* 94 Mo. App., 117.

The court there speaks of the conduct of detectives which "entrap the *law-breaking class* by gaining their confidence and practicing deceit upon them." And the conviction is upheld upon the ground that

> "To discover and bring to justice *those who subtly, clandestinely and illegally dispense liquors, the methods resorted to in this case are sometimes indispensable,* and when nothing more than the truth is elicited and the guilty are brought to justice through their efforts, a valuable service to the community will have been rendered."

The case next cited is

Davis v. *State,* 158 S. W. (Tex.), 288.

The defendant there testified in support of his plea that he had been induced to commit the crime that the county attorney "suggested, 'You are always asking " us for favors, and doing nothing for us,' and they " then went into a private office where the remainder " of the negotiations took place." (p. 290) The court repudiated the view of the trial judge that if the first suggestion proceeded from the government officer an offer to bribe him would not be an offense. This, however, is a far cry from the course of conduct of the government agents in the case at bar which culminated in the procurement of the overt act alleged. The attitude of the officer in the Texas case was in the nature of a decoy throwing open to the defendant the opportunity to commit a crime if he entertained a criminal purpose. It operated as a test of the honesty of his intentions and not as an influence creative of criminal desire. The situation in the Texas case is further distinguishable from that at bar because the act there in question was *malum in se*. The pertinency of this factor and also the scope and effect which should be accorded to the *Davis* case is clearly determined by the fact that a few months prior to that decision the same court, consisting of the same judges, announced in

Scott v. *State,* 153 S. W., 871,

the principles which are quoted at page 23 of the opening brief. The court held, in a prosecution for

violation of the liquor laws—*malum prohibitum*—as follows:

> "The officers are not justified in inducing men to commit crime or in employing others to induce them to commit crime in order that prosecutions may be instituted. It is his duty as an officer, where he understands that parties are engaged in crime, to use every effort legitimate and permissible by law to detect and ferret out crimes and bring criminals to trial and justice. But this does not justify him in employing parties to go out and induce the citizens to commit crime that prosecutions may be instituted and carried on."

The authority of this decision has never been questioned or limited in any way.

There follows in the government's brief a discussion of the federal decisions upon the subject of entrapment where violations of the postal laws or thefts from the mails where involved. It was held—in line with the distinction for which we have always contended—that where a person is suspected of sending unlawful matter through the mails and does so in response to a decoy letter, there is no defense. The same conclusion is reached where one suspected of stealing from the mails commits this act with respect to a letter sent by government agents to detect the offender. In these cases the criminal purpose exists prior to the activity of the government officials, which serves solely to present the opportunity to the criminal and thereby detect him. The leading case is

Grimm v. *U. S.*, 156 U. S., 604.

There the difference between detecting and making a criminal is clearly pointed out by the court. The statement is of more than persuasive force in the case at bar. In sustaining the conviction it was held:

> "It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business."

The district attorney professes to believe (brief, p. 21) that the Supreme Court did not intend to say what its language necessarily means. Counsel's view is apparently the result of a failure to perceive the basic distinction between conduct of the government in offering the opportunity to the suspect to commit the crime in which he is believed to traffic and in inspiring the original criminal purpose in the mind of an innocent man. In none of the other cases in the United States Supreme Court cited by the district attorney was there even a suggestion by the government official which procured the criminal act. A passive medium was presented to the suspect upon which his guilty mind seized and was thereby detected.

We may leave the federal citations with a word concerning the case of

United States v. *Morgan,* 181 Fed., 587.

From the opinion it appears that the defendant was engaged in selling water under a false brand in New

York City and was therefore amenable only to the state authorities. An order for some water was sent by a government agent from Newark, N. J., and in response the defendant made an interstate shipment thus offending against a federal law and was held guilty. In this case as in all others where a conviction was permitted the criminal activity long antedated the participation of the government official—a criminal was not made.

But the opinion of the district judge is of no consequence whatever because of the treatment which the case received upon writ of error in the Supreme Court of the United States.

U. S. v. *Morgan,* 222 U. S., 274.

The trial judge had granted the motion in arrest of judgment on the ground that although the conduct of the government agent did not deprive the defendant's act of criminal character it made it necessary under the statute that defendant be given notice and an opportunity to be heard by the Department of Agriculture. This had been wanting and the conviction was set aside. However, the statement of the case by the Supreme Court discloses that the government officer sought to purchase the water not from the defendant but from a druggist in Newark:

> "In October, 1908, a food and drug inspector applied to a druggist in Newark, New Jersey, for several bottles of this water. The druggist, not

having them in stock, ordered them from the defendants, who shipped them from New York to the druggist in Newark. He delivered them to the inspector, who paid therefor.

"The judge, in his opinion, treats the prosecution as having been instituted by the inspector, though this does not affirmatively appear in the record, and the defendants were not indicted until April, 1910, when they were found guilty of shipping misbranded goods in interstate commerce." (p. 275)

The question of entrapment was not considered. The defendant resisted the writ of error on other grounds which, however, were overruled and the judgment in his favor was reversed. Therefore the meager language of the district judge upon which the district attorney relies not only does not support his contention but is *brutum fulmen.*

The cases cited by the government which hold that where the defendant is induced by another private individual to commit a crime there is no defense, are so plainly inapplicable that they merit no further consideration.

The extract quoted from the case of

O'Halloran v. *State,* 31 Ga., 206,

discloses that it falls definitely within the category of detection of a criminal. It is said not to be wrong to lay a trap *"to detect a culprit"* and speaks of the plan *"to catch the offender."*

The next case cited is

People v. *Mills,* 178 N. Y., 274.

There the unlawful purpose originated with the defendant who procured one of his associates to approach the public prosecutor with the view of buying him off and thereafter treated personally with a detective as the representative of the prosecutor. The district attorney says in his brief:

> "The above case would seem to be particularly applicable to an extreme case of instigation to commit crime by federal officers charged with the duty to detect and suppress such crime, as well as to the case at bar." (p. 31)

To demonstrate counsel's error it is only necessary to quote from the report of the decision:

> "He (the defendant) discussed Garvan and the latter's attitude to the case, and asked Meloy if he would not make an engagement with Garvan so that the defendant could see and have a talk with him and see if the prosecutions could not be stopped, and there was some conversation about the money which had been paid for counsel, and that if it were given to Garvan it would accomplish greater results. The defendant finally said: 'I will not give Hart any money or any lawyer. . . . I know the head of this thing and I am going to give what money I give to Garvan. . . . When he said he wanted to get in contact, I asked him if he knew what he was doing, what he was about; he said he thought he did. Then I said the same general remark—be careful.'" (p. 277)

This conversation was between the defendant and Meloy, his associate, who had no connection with the government officers.

Then quoting the testimony of the detective:

> "I asked him then, 'Well, what is it you want us to do?' He says, 'Well, these indictments that have been found against Dr. Flower you can withdraw them and misplace them, lose them or dispose of them in some way or Mr. Garvan could go into court and permit him to go into court on a demurrer and have the indictments quashed.' I told (him) that I would see Mr. Garvan and submit this to him and let him know." (pp. 278-9)

That the issue there was essentially different from that at bar is further apparent from the following extract from one of the two dissenting opinions filed by members of the New York court who believed that a conviction should not be had even under the facts of that case:

> "The argument of the learned court below in support of the conviction rests upon a single proposition, which I quote from the opinion. 'Having proposed the scheme and set in motion the forces by which the indictments were actually removed from the files of the court and delivered to him, every act from the inception of the scheme to its final consummation by the delivery of the indictments was the act of the defendant, no matter by whom it was performed, and it constituted him a principal in the transaction.'" (pp. 301-2)

Among other things the majority opinion announces

the principle that the conduct of the officers of the state government was not the conduct of the state itself, thereby distinguishing the case from those of larceny and burglary where the consent of the person stolen from is held to deprive the act of criminal taint. Upon the same ground the brief of the government contends against the pertinency of this line of authority to the facts at bar. From the argument which we have made here it is plain that we need not and do not rely upon cases of crimes involving the taking of property and that there is ample authority in our support which is not open to this objection. But a few ideas upon this subject are pertinent.

The point of distinction just referred to is not an accurate one. In the first place, in cases of larceny and burglary the defendant has frequently been held guilty where the activity of the owner of the property and the detectives have been restricted to pretended cooperation after discovery of the defendant's purpose to commit the crime. But where the government agents have had the unlawful purpose suggested to the defendant and have persuaded him into the act, no conviction has been sustained. The element of consent is present in both cases. This, then, is not material. But the distinguishing feature is the policy of the law which while tolerating all reasonable means to detect a criminal will not permit the government officers to make one. That same public policy should preclude a conviction in the case at bar.

But it is worthy of note that there is another factor present in the case at bar which serves to distinguish it from the *Mills* case and the conclusion—there stated—that the State of New York was not bound by the acts of the public prosecutor. The government here wanted to get a hold on Woo Wai. This was a governmental purpose which did not alone concern the making of a criminal. For there was the moving governmental motive to obtain information which the government believed could be elicited from this Chinaman. The matter thus concerned one of its administrative departments. To induce Woo Wai apparently to break the law was a means to a governmental end—a link in the devious chain which the government saw fit, in its omniscience, to forge as a proper method of checking up the efficiency and integrity of the Immigration Department. The law which the United States procured Woo Wai to break was a mere administrative regulation. No criminality was inherent in the act itself; there was no *malum in se*. The theories underlying the exclusion of one class of Chinese and the admission of another may be ethically unsound and unjust. Nevertheless the United States government has determined that it shall be so and that determination is final. But it has designated certain men whose sole office is to maintain this arbitrary regulation, to prevent violations and to apprehend violators. These men rank from the cabinet officer to the inspector. Their conduct in the premises was, regardless

of the motive that impelled it, an administration of the law of the United States and the convictions which induced their action were conclusive in the matter. When the government seeks to obtain a conviction upon these facts should it not be held to be concluded by the conduct of its agents? Should it be permitted to disavow the activity of its officials in making criminals of these Chinese and nevertheless obtain a conviction upon the basis of the testimony of these same officials who have gone upon the witness stand not as conspirators—the district attorney has vehemently repudiated this suggestion—but as inspectors still pursuing their employment as such in an effort to make felons of the men whose apparent offense they have already induced?

We have postponed until this time a consideration of the case

> *Commonwealth* v. *Wasson,* 42 Pa. Sup. Ct. Rep., 38,

quoted in the government's brief, because it serves to introduce another line of argument. While the extract from the opinion quoted by the district attorney seems to support his contention, it will be found upon a reference to the report of this case that the defendant was one of the councilmen of Pittsburgh who were suspected of being engaged in various forms of graft and the activity of the detectives was inspired by an organ-

ization whose purpose was to promote clean government.

> "According to a fair and legitimate interpretation of the commonwealth's testimony, the general purpose for which Wilson was employed was the investigation of the previous passage of ordinances and measures through councils by bribery of councilmen, of which there had been rumors, particularly the ordinances designating six banks as depositories of city moneys and the obtaining of evidence of such corrupt practices on the part of councilmen." (p. 46)

It is clear, therefore, that this case falls within the category of those where the activity of the detectives is directed to the end of detection in crime of persons suspected to be engaged therein. It is further to be noted that the detectives were not the agents of the government but were in the employ of a private organization.

But by far the most interesting feature of this decision lies in a part of the opinion of the court which the district attorney has seen fit to omit from his quotation. At page 25 of the government's brief a sentence is quoted beginning with the words "Without declaring, etc.," as if it appeared in the opinion in immediate sequence after that ending with the words "by the detective." Upon consulting the opinion it will be found that between these two sentences there are over three pages of illuminating discussion. If these had been included the real meaning of this au-

thority and its weight aginst the contention of the government would have been clear. After an analysis of many of the leading decisions the court there held:

> "Again, in considering the question of public policy the clear distinction, founded on principle as well as authority, is to be observed between measures used to entrap a person into crime in order, by making him a criminal, to aid the instigator in the accomplishment of some corrupt private purpose of his own, and artifice used to detect persons suspected of being engaged in criminal practices, particularly if such criminal practices vitally affect the public welfare rather than individuals." (p. 57)

The court there clearly has in mind the principle that public policy does not permit the making of the criminal by the representatives of the government. What purpose the United States officials hoped to accomplish by using their hold on Woo Wai to force from him the information they believed him to possess will never be known. What personal enmities were to be gratified will never be ascertained. For when they got their hold on him either they found that he knew nothing or else he refused to "come through." And this prosecution was apparently the penalty which he has paid, either for his ignorance or for his recalcitrance.

But the outcome of the plot was far different than the purpose that impelled it. There was apparently no original intention to make a criminal of Woo Wai. The government officers were not interested in him.

He and his friends were to be the pawns in their game and the plan was to induce him into an apparent breach of the law and then by threats of prosecution to obtain the desired information. It is respectfully submitted that no crime was committed and that under the facts no conviction can be maintained.

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